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No. 95-1154

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DALKON SHIELD CLAIMANTS TRUST,
Petitioner,

v.

SUSAN SHADBURNE-VINTON,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF BAXTER HEALTHCARE CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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February 20, 1996

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pursuant to Rule 37.2 of the Rules of this Court, Baxter Healthcare Corporation ("Baxter") respectfully moves for leave to file the attached brief as *amicus curiae* in support of the petition for a writ of certiorari submitted by the Dalkon Shield Claimants Trust. The respondent, Susan Shadburne-Vinton, has refused to consent to the filing of this brief.

Baxter, headquartered in Deerfield, Illinois, is a wholly-owned subsidiary of Baxter International Inc. It is one of the nation's largest manufacturers of healthcare products and devices, and sells, among many other products, heart valves, intravenous solutions, kidney dialysis machines and solutions, medical therapies derived from

human blood and from recombinant DNA, and a wide range of hospital supplies. Baxter's potential liability for many of the devices it (or other companies it has acquired) sold long ago has been extinguished, in many states, by statutes of repose. That potential liability, however, may be revived in various states where Baxter is amenable to suit if the judgment of the Fourth Circuit is allowed to stand. If that occurs, Baxter, like other manufacturers of medical products, will be forced, for an indefinite period of time, to divert attention and resources from developing new and innovative products to defending against legal claims it understood had long ago been extinguished.

Baxter also has a particular interest in this case because it is a successor-in-interest to a company which manufactured and sold breast implants in Oregon, among other places. It purchased that company's liabilities during a period when Oregon had in place a general statute of repose. In 1994, however, Oregon selectively exempted claims involving breast implants from that statute, Or. Rev. Stat. § 12.276 (1994), just as it selectively exempted claims involving IUDs several years earlier in the statute addressed in the petition, Pet. at 3, 5. Thus, despite the fact that it neither manufactured nor sold breast implants, Baxter may be forced to expend substantial resources in defending suits relating to those products unless the Fourth Circuit's judgment is overturned. For these reasons, Baxter wishes to present its views to assist the Court in understanding the extraordinary importance to all manufacturers of the legal principle that statutes of repose cannot retroactively be abolished without violating the Due Process Clause of the Fourteenth Amendment.

Accordingly, Baxter urges the Court to grant leave to file the *amicus curiae* brief that accompanies this motion.

Respectfully submitted,

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QUESTION PRESENTED

Whether a state statute that revives liability which had been extinguished by a statute of repose violates the Due Process Clause.

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BRIEF OF BAXTER HEALTHCARE CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The interest of *amicus curiae* is set forth in the accompanying motion for leave to file this brief.

REASONS FOR GRANTING THE PETITION

Statutes of repose have been adopted in many states to provide manufacturers, both large and small, as well as various groups of professionals, with assurance that they can plan their affairs free from the threat of potential liability arising from products they made or services they rendered in the very distant past. Manufacturers and professionals reasonably rely on these statutes in structuring their affairs. This case provides this Court with an appropriate opportunity to reaffirm that these statutes actually

provide the certainty they purport to provide, and to reject a rule of law, such as that embodied in the Fourth Circuit's opinion, that states are free to destroy these protections retroactively and selectively by legislative fiat.

I. STATUTES OF REPOSE ARE A COMMON SOLUTION TO A SERIOUS PROBLEM, AND PROVIDE MANUFACTURERS AND PROFESSIONALS WITH MUCH-NEEDED CERTAINTY IN ORDERING THEIR DAY-TO-DAY ACTIVITIES.

As this Court is well aware, manufacturers of virtually all products are subject to lawsuits based on theories of strict liability, breach of warranty and negligence arising in connection with the manufacture and sale of products. The risk of such litigation is especially acute in the case of medical products, which often are used in patients who are sick or dying. In such patients, it may be very difficult to distinguish between injuries—if any—resulting from a product and the effects of the patient's underlying illness. And, because such patients often do not recover fully, there is at least a temptation to use litigation as a means of imposing the responsibility for any adverse outcome on the manufacturer of any medical product used during the treatment.

As this Court also is no doubt aware, the number of product liability suits soared during the 1960s and 1970s, and recoveries increased dramatically during that same period. *See, e.g.*, Note, *Limiting Liability: Products Liability and a Statute of Repose*, 32 Baylor L. Rev. 137, 139 (1980). As a result, insurers have been obliged to hike premiums, which manufacturers pass on to consumers in the form of higher prices. Some manufacturers, of course, unable to afford or even to obtain insurance, have been forced to remove products from the market.[1]

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[1] As the American Medical Association reported in 1988,

> Innovative new products [including vaccines, contraceptives, and other drugs and devices] are not being developed or are

To address the adverse social consequences of this explosion in products liability, many states, starting in the late 1970s, adopted statutes of repose. By the early 1980s, 48 states had adopted 98 such statutes. *See* Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U. L. Rev. 579, 580 & n.3 (1981). Many of these statutes concern liability for products; others relate to medical malpractice and negligence by architects and contractors; and still others are general in scope. *Id.* at 580-81 n.3.

Statutes of repose address a number of serious problems. They relieve manufacturers and professionals of the obligation to defend against charges at a time when documents likely are no longer available and when memories have faded. They also relieve manufacturers of the burden of defending older design standards in the light of newer, better standards that were not achievable at an earlier time.

Most important, however, statutes of repose provide manufacturers absolute freedom from distant liability. As a consequence, manufacturers are supposed to be able to plan how to deploy their resources and, perhaps more critically, how properly to price their products, even in highly competitive markets, to reflect their risk of liability. In this way, such statutes also should allow companies to purchase and sell lines of business secure in the knowledge that the value they have assigned to the liabilities is relatively accurate.

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being withheld from the market because of liability concerns or inability to obtain adequate insurance. Certain older technologies have been removed from the market, not because of sound scientific evidence indicating lack of safety or efficacy, but because product liability suits have exposed manufacturers to unacceptable financial risks.

AMA Board of Trustees, *Impact of Product Liability on the Development of New Medical Technologies* at 1 (June 1988).

Beyond these benefits, statutes of repose provide stability in the markets for products liability insurance. *See, e.g., Raithaus* v. *Saab-Scandia of Am., Inc.*, 784 P.2d 1158, 1161 (Utah 1989) ("[s]tatutes of repose . . . curb rising insurance rates [and] increase the availability of insurance"). Insurance rates are set on the basis not only of expected claims, but also on claims history. If dead claims can unexpectedly be revived, the whole process of statistically predicting future risks on the basis of past history is undermined, and insurers, at a minimum, are forced to charge a premium to protect against antique claims. *See generally* Note, 32 Baylor L. Rev. at 141.

This Court long ago recognized the importance of statutes of repose in holding that the immunity from liability that they confer is a constitutionally protected property right, which cannot retroactively be taken by a legislature. *William Danzer & Co.* v. *Gulf & Ship Island R.R.*, 268 U.S. 633 (1925). The Fourth Circuit, however, disagreed, and expressly refused to follow the plain holding of this Court. The implications of that decision, and a similar decision by the D.C. Circuit in *Wesley Theological Seminary of the United Methodist Church* v. *United States Gypsum Co.*, 876 F.2d 119 (D.C. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990), are enormous. Under the terms of those decisions, the core benefit which statutes of repose provide nationwide —absolute predictability with respect to the value of old claims—is entirely undermined.

II. THE FOURTH CIRCUIT'S HOLDING CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS.

1. The Fourth Circuit's ruling, on its face, conflicts with this Court's decision in *Danzer* as well as the decision in *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304 (1945). In *Danzer*, this Court squarely held that the Due Process Clause prohibited Congress from reviving a time-limited claim created by the Interstate Commerce Act which, like the statute of repose in this case, "not

only barred the remedy but also destroyed the liability of defendant to plaintiff." *Danzer*, 268 U.S. at 636. According to this Court, "[o]n the expiration of the two-year period, it was as if liability had never existed." *Id.* Thus, revival of the dead claim "would . . . deprive defendant of its property without due process of law." *Id.* at 637.

This Court affirmed that holding some 20 years later in *Chase*. In that case, this Court held that an ordinary statute of limitations could retroactively be extended, reasoning that it had merely barred the plaintiff's remedy but had not extinguished its right (or, conversely, the defendant's liability). 325 U.S. at 314. In so doing, however, the Court expressly recognized that *Danzer* remained good law, stating that that case stood for the proposition that "where a statute in creating a liability also put a period to its existence, a retroactive extension of the period after its expiration amounted to a taking of property without due process of law." *Id.* at 312 n.8. This Court also acknowledged the continuing vitality of *Danzer* as recently as 1976. *See International Union of Elec., Radio & Mach. Workers, AFL-CIO* v. *Robbins & Myers, Inc.*, 429 U.S. 229, 243 (1976).

Notwithstanding the unmistakable clarity of these decisions, the Fourth Circuit elected not to follow them. According to that court, a more recent line of cases—including *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717 (1984), and *General Motors Corp.* v. *Romein*, 503 U.S. 181, 191 (1992)—"commands . . . a different analysis." Pet. App. at 10a-11a. And, even more specifically, the court of appeals held that "[i]n light of this more recent Supreme Court precedent, we find that the analysis used by the Court in *Danzer* [and] *Chase* . . . is outdated and no longer valid for purposes of analyzing the constitutionality of retroactive legislation." *Id.* at 11a-12a.

In so doing, the Fourth Circuit plainly followed a course inconsistent with this Court's edict in *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989). There, the Fifth Circuit declined to follow *Wilko* v. *Swan*, 346 U.S. 427 (1953), because it believed, much like the court of appeals in this case, that "subsequent decisions ha[d] reduced *Wilko* to 'obsolescence.'" *Id.* at 479. This Court, in response, granted the petition and made clear that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving this Court the prerogative of overruling its own decisions." *Id.* at 484. *See also Thurston Motor Lines* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (per curiam) ("Needless to say, only this Court may overrule one of its precedents").

More importantly, at this stage, the Fourth Circuit's decision, by virtue of its statement that a decision of this Court is "no longer valid," created an issue which manifestly is worthy of review by this Court. *See, e.g., Rodriguez*, 490 U.S. at 477; *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 103 (1944) (granting certiorari where court of appeals based its decision not on existing precedent but on "prophecy that this Court would change its course"); *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943) (granting plenary review in case, *Barnette* v. *West Virginia State Bd. of Educ.*, 47 F. Supp. 251, 253 (S.D.W. Va. 1942), in which three-judge panel stated that "we do not feel that it is incumbent upon us to accept [one of this Court's decisions] as binding authority"); *see also Funk* v. *United States*, 290 U.S. 371 (1933) (granting certiorari to resolve tension between two lines of Supreme Court decisions); *cf. United States* v. *International Business Machines Corp.*, 116 S. Ct. 594 (1995) (granting certiorari in case, *International Business Machines Corp.* v. *United States*, 59 F.3d 1234 (Fed.

Cir. 1995), in which Federal Circuit declined to predict that this Court would overrule older precedent based on more recent developments in the law).

2. The decision of the Fourth Circuit also conflicts with a decision of the Eighth Circuit as well as decisions of a number of state courts, which have adhered to the doctrine set forth in *Danzer*. *See, e.g., In re Alodex Corp. Sec. Litig.*, 533 F.2d 372, 374 (8th Cir. 1976) (affirming district court opinion expressly adopting reasoning of *Danzer* on ground that it was "well reasoned"); *Smith* v. *Westinghouse Elec. Corp.*, 291 A.2d 452, 455 (Md. 1972) (relying on *Danzer* to nullify statute retroactively enlarging period for bringing wrongful death action); *Haase* v. *Sawicki*, 121 N.W.2d 876, 881 (Wis. 1963) (relying on *Danzer* to hold that retrospective extension of limitations period in statute of repose violates Due Process Clause).

These cases were correctly decided. There can be little question that statutes of repose create a strong property interest protected by due process. Indeed, the reliance interests created by such statutes are demonstrably more powerful than those involving claims to tenure in employment that this Court has long recognized as subject to the constraints of due process. *See, e.g., Perry* v. *Sindermann*, 408 U.S. 593, 601 (1972); *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564, 571-72 (1972).

Thus, the only question is whether a state, such as Oregon, having formally conferred this special protection by legislation precisely to lull private parties to perform their primary conduct in a particular way, can simply change its mind in response to shifting political winds and dash all of the reasonable expectations of those private individuals and groups. To be sure, states have wide latitude to promote public policy, but there are limits to how far a state can go in changing the rules of the game

after the fact. *See Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 108 (1938); *cf. Lynch* v. *United States*, 292 U.S. 571, 579 (1934) ("Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States"). The statute here goes too far.

In short, the Court was correct in *Danzer* in concluding that a legislature's arbitrary choice to prefer one group of citizens over another in the face of a clear and formal commitment to provide repose exceeds its authority as constrained by the Due Process Clause. At a minimum, the *Danzer* opinion is sufficiently well reasoned that its fate should lie exclusively in the hands of this Court and not be left to the lower courts to choose to follow it or not as they prefer.

* * * *

The essential benefit of statutes of repose is that they provide certainty and allow manufacturers and professionals to structure their affairs without fear of remote liability. Although this Court seemingly disposed of the question whether such statutes confer constitutionally protected property rights upon their beneficiaries in *Danzer*, and while that decision has been widely followed, a number of courts, including the Fourth Circuit, have chosen consciously to disregard this Court's holding, speculating that this Court has changed its view. The Court should grant the petition to resolve that question.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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